MOTION TO DISMISS WRIT OF ERROR WHICH IS UNITED A MOTION TO AFFIRM JUDGMENT.

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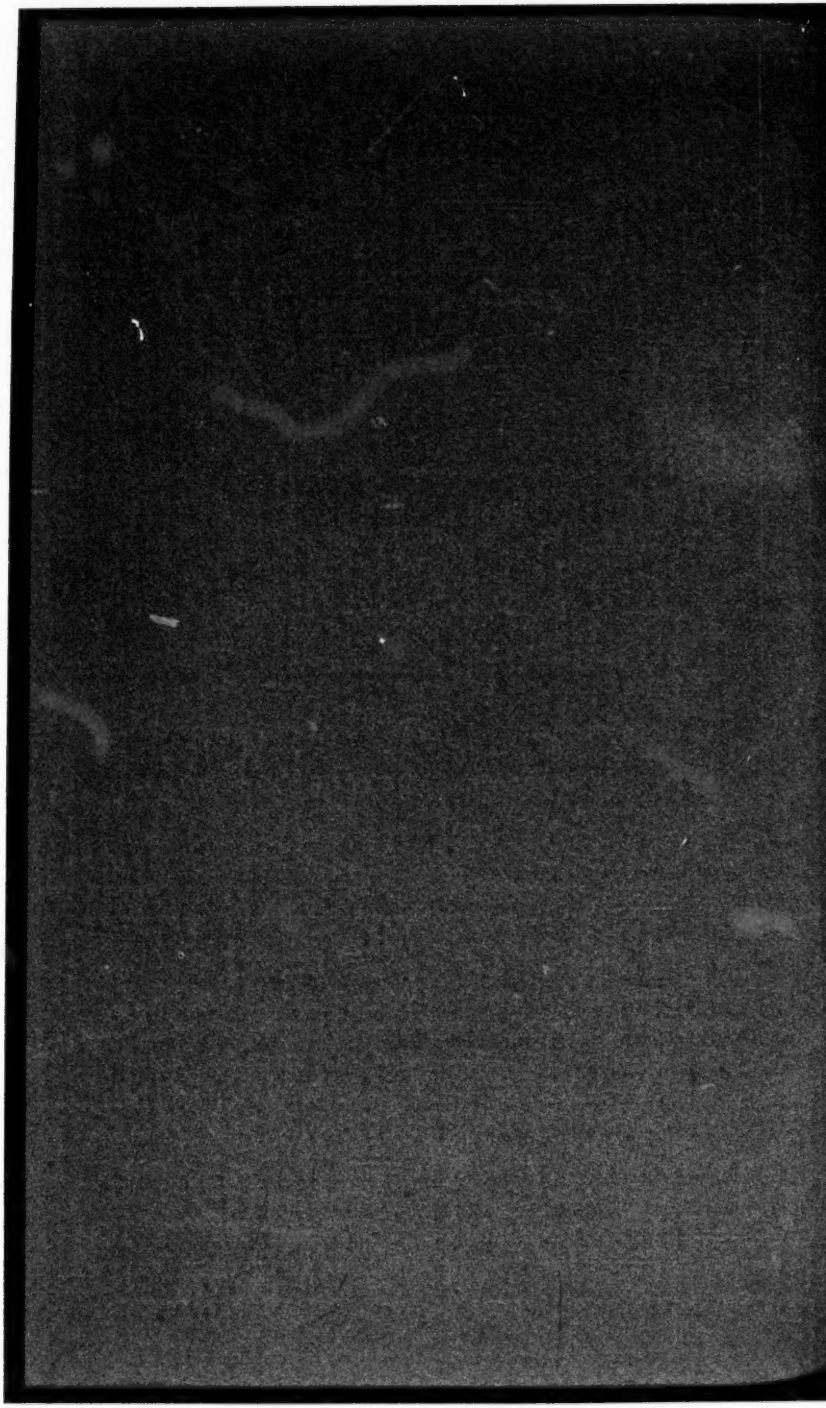

MOTION TO DISMISS WRIT.

Comes now the defendant in error, Matilda B. White, and moves the court to dismiss the writ of error herein.

STATEMENT OF THE FACTS.

1. E. G. Bacon and Sophia D Bacon were married in California and thereafter commenced to reside in Washington Territory in October, 1873.

2. In 1877, E. G. Bacon purchased with community funds acquired subsequent to and during his marriage with Sophia D. Bacon, the property in controversy herein; and they immediately took up their residence on said property.

3. Sophia D. Bacon died intestate in July, 1880, leaving her surviving her husband, E. G. Bacon, and her three children, Ellen T. Nelson, Matilda B. White, and Amelia McDonald, defendants in error herein; the two last named being her children by a former marriage; and the first named being the daughter of Mr. and Mrs. Bacon.

4. In 1892, E. G. Bacon became indebted to plaintiff in error, and thereafter, in April, 1895, plaintiff in error obtained judgment in the State Court against him and

caused execution to be issued thereon and levied upon the lot in question; and in March, 1896, the lot was sold at sheriff's sale to the plaintiff in error.

5. During the pendency of this suit, and before the trial thereof, the plaintiff in error obtained a deed from Ellen T. Nelson, of all her right, title, and interest in and to the lot in question. The said E. G. Bacon having died prior thereto.

6. The defendant, Matilda B. White, prior to the commencement of this action, purchased all the interest of Amelia McDonald, defendant in error, in said lot.

7. This suit was commenced in May, 1897.

THE ISSUES.

1. The plaintiff in error, claiming to be the owner in fee simple of said lot by virtue of his said purchase at sheriff's sale, commenced this action against the defendants in error, to remove a cloud from, and to quiet, his title to said lot.

2. All of the defendants filed a joint answer, which was verified by the defendant, Ellen T. Nelson, in which they denied that plaintiff in error had acquired title to the whole of said lot, and in which they alleged that they, as the heirs at law of Sophia D. Bacon, were the owners of an undivided one-half interest in said lot.

3. The case was tried upon an agreed statement of facts, and the court made its findings accordingly; and as conclusion of law, held that the plaintiff in error was the owner of, and entitled to have his title quieted to an undivided two-thirds of said lot; and that the defendant in error, Matilda B. White, was the owner of, and entitled to

have her title quieted to, an undivided one-third of said lot.

4. After the trial of this cause, and after the trial court had decided the case and announced its decision, and made its findings of fact and conclusions of law, the plaintiff in error filed herein his objections to conclusion of law No. 2, which conclusion was as follows: "Conclusion No. "2. That the defendant Matilda B. White is the owner of "and is entitled to a decree herein quieting her title to an "undivided one-third of the property in controversy in this "action, as prayed for in the amended and separate answer "of the defendants Matilda B. White and Amelia McDonald "filed herein."

Plaintiff's in error objection was as follows, to-wit:

"Plaintiff specifically objects to said proposed conclu-"sion No. 2 on the ground that under the laws in force at "the time the property was purchased, E. G. Bacon was the "owner of the property and was entitled to the succession "to all the property in case of the prior death of Mrs. "Bacon, and that at the time of the death of Mrs. Bacon "in 1880, Mr. Bacon was the owner in fee simple of all of "said property. That to give the law of 1879 entitled An "Act Regulating and Defining the Property Rights of Hus-"band and Wife, approved November 14, 1879, the con-"struction, effect and force given by the court, to-wit, that "it took from Mr. Bacon the right of succession to the "whole of the property, and the right to dispose of it, "would be to give it a retroactive force contrary to section "31 of said act; and to give it such a retroactive force and "take away the right of survivorship in said property and "take away the right to dispose of it, would be contrary to "Article 1, Section 10 of the Constitution of the United "States in that it would impair the obligation of the con-

"tract by which Mr. Bacon acquired said property, and "would deprive him, his successors and assigns of the right "of the survivorship to the property in controversy, which "was a vested right under the contract and the laws in "force in the Territory when the property was acquired; "and upon the further ground that if said law is given said "effect and force above mentioned, it would be depriving "Mr. Bacon, his successors and assigns, of property without "due process of law, and be contrary to and in contraven-"tion of Article 14 of the Constitution of the United States, "and plaintiff claims the protection of both said provisions "above specified, of the Constitution of the United States "in this action."

JUDGMENT.

The trial court entered of record its decree in accordance with its decision as announced and according to its said findings of fact and conclusions of law, quieting the title of plaintiff in error to an undivided two-thirds of said lot and quieting the title of the defendant in error, Matilda B. White, to an undivided one-third thereof.

APPEAL TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Plaintiff then appealed from said judgment to the Supreme Court of the State of Washington, and the case was duly heard in that court, whereupon the judgment of the trial court was affirmed. Thereafter a petition for rehearing was filed by plaintiff in error in said court, and rehearing denied.

WRIT OF ERROR.

Thereupon plaintiff in error applied to one of the Justices of this court for a writ of error herein, which, after due hearing and argument both by plaintiff in error and defendants in error, was denied. And afterwards plaintiff in error, without notice to defendants in error, applied *ex parte* to another Justice of this court for writ of error herein, and same was granted.

GROUNDS OF MOTION.

I.

This court has no jurisdiction of the subject matter of this suit.

II.

It does not appear from the record that plaintiff in error claimed the protection of any of the provisions of the Constitution of the United States at or prior to the trial and decision of this case in the trial court. The averments of the complaint of plaintiff in error do not present any federal question.

III.

There is no federal question presented by the record in the case, and no federal question was presented to or decided by the Supreme Court of the State of Washington.

IV.

The alleged contract under which Bacon and wife pur-

chased the property in controversy in 1877,—the obligation of which plaintiff in error now claims has been impaired,—is not in the record, nor are any of its terms, conditions or obligations stated therein.

V.

The plaintiff in error was not a party to the alleged contract, nor was he in any manner interested in the property conveyed thereby, either as lienor, purchaser, or otherwise, until about seventeen years thereafter, at which time he obtained a sheriff's deed thereto; and there is no proof that the person, whose interests in the property in question plaintiff in error claims to have acquired by said sheriff's deed, had not consented to and acquiesced in all of the laws of said Territory during said seventeen years.

VI.

That Sec. 10 of Article I and Article XIV of the Constitution of the United States, are limitations upon the power of the sovereign STATES of the union and have no application to the acts of a Territorial Legislature that has, and can exercise only such powers as are delegated to it by Congress.

VII.

It is not claimed by plaintiff in error that the community act of 1873, or the act relating to descent of real estate, passed in 1875 by the territorial legislature, are in any wise invalid; but he contends that the supreme court of the State of Washington has placed an ERRONEOUS CONSTRUCTION on those acts. These acts being in force when the alleged contract of purchase by Bacon and wife was

made, the decisions of the state court construing them are conclusive.

MOTION TO AFFIRM.

The defendant in error, Matilda B. White, moves the court to affirm the judgment for the following reasons:

1. That, although the record may show that this court has jurisdiction, it is manifest that the writ of error herein was taken for delay only.

2. That the question on which the jurisdiction depends is so frivolous as not to need further argument.

3. The purchase, by plaintiff in error, from Ellen T. Nelson, during the pendency of this action of her interest in the lot in controversy and the subsequent prosecution of this claim, is champertous. Mrs. Nelson never claimed that she inherited the whole of this property, as the heir of E. G. Bacon or otherwise; but, on the contrary, in her verified answer filed in this cause, she alleged that she and her two co-defendants, the defendants in error, inherited one-half of it as the heirs of their mother. Plaintiff in error, an attorney, bought her said interest pending this litigation, and now attempts to assert rights against her sisters, defendants in error, never claimed by his grantor, Ellen T. Nelson.

Respectfully submitted,

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